INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED IN THE CASE .	2
STATEMENT OF THE CASE	4
1. Procedural History of the Case	4
2. Facts Material to the Questions Presented . . .	5
BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE	7
ARGUMENT FOR ALLOWANCE OF WRIT .	7
(a) Conflict in Circuit Courts	7
(b) Important Question of Federal Law	8
CONCLUSION	12
APPENDIX	13

TABLE OF CITATIONS

	Page
Commissioner of Internal Revenue v. Kelly's Estate, 84 F.2d 958 (CCA 7, 1936)	8
Glasser v. Commissioner of Internal Revenue, 69 F.2d 254 (CCA 8, 1934)	8
Latty v. Commissioner, 62 F.2d 952 (CCA 6, 1933)	8

INDEX TO APPENDIX

APPENDIX A
Opinion of the United States Tax Court . . . . . .

APPENDIX B
Decision of the United States Tax Court . . . . . .

APPENDIX C
Opinion of the United States Court of Appeals for the Fourth Circuit . . . . . .

IN THE SUPREME COURT OF
THE UNITED STATES

No. ____

LEONARD SUTTON, Executor of the
Estate of Sam Sutton,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

Petitioner, Leonard Sutton, Executor of the Estate of Sam Sutton, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in the above styled case on 19 June 1974.

OPINIONS BELOW

A memorandum finding of fact and opinion was filed by the United States Tax Court on 24 September 1973 and is Appendix A hereto. A decision in favor of the respondent was entered by the United States Tax Court on 24 September 1973 and is Appendix B hereto. An opinion of the United States Court of Appeals for the Fourth Circuit was issued 19 June 1974 and is Appendix C hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was issued on 19 June 1974 affirming the 24 September 1973 United States Tax Court decision in favor of the respondent.

Petitioner has no further appellate remedy under the laws of the United States.

The jurisdiction of this Court is involked under 28 USC 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether an estate is entitled to claim a debt as a deduction in its Federal Estate Tax return when that debt is based upon an antenuptial agreement in which each party agreed, inter alia, that the survivor would receive a specific monthly annuity from the estate of the first to die.

STATUTES INVOLVED IN THE CASE

Internal Revenue Code of 1954 (26 USC):

26 USC 2043, (b) Marital rights not treated as consideration. -- For purposes of this chapter, a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

26 USC 2053, (a) General rule. -- For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts--

(1) for funeral expenses
(2) for administration expenses,
(3) for claims against the estate, and
(4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

26 USC 2053(c)(1)(A) Consideration for claims. -- The deduction allowed by

this section in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded on a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; except that in any case in which any such claim is founded on a promise or agreement of the decedent to make a contribution or gift to or for the use of any donee described in section 2055 for the purpose specified therein, the deduction for such claims shall not be so limited, but shall be limited to the extent that it would be allowable as a deduction under section 2055 if such promise or agreement constituted a bequest.

STATEMENT OF THE CASE

1. Procedural History of the Case

Petitioner filed an estate tax return with the Commissioner of Internal Revenue and claimed the value of the annuity of the surviving spouse as a marital deduction under Section 2056 of the Internal Revenue Code of 1954. The deduction was disallowed by the Commissioner. Petitioner brought an action on 26 November 1971 in the United States Tax Court asking the court to allow the marital deduction as claimed in the estate tax return or in the alternative to allow petitioner to claim the value of the annuity of the surviving spouse as a debt of the estate under Section 2053 of the Internal Revenue Code of 1954. The Tax Court on 24 September 1973 declined to

allow the deduction under either section and entered judgment against the petitioner.

Petitioner docketed an appeal of that decision in the United States Court of Appeals for the Fourth Circuit on 25 January 1974. Briefs were filed and oral argument made and on 19 June 1974 the Court of Appeals affirmed the determination of the Tax Court. Petitioner has no further remedy for review save the grant of the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

FACTS MATERIAL TO THE QUESTION PRESENTED

1. The pertinent facts for the purpose of the appeal are not in dispute and were submitted on stipulation of the parties.

2. On 17 November 1965 Sam Sutton, (hereafter referred to as Sam) 65 years old and a widower entered into an antenuptial agreement with Helen Eisenson, (hereinafter referred to as Helen) 59 years old and a widow.

3. At the time of the antenuptial agreement between Sam and Helen, Sam's assets were valued at $296,946.75 and Helen's assets were valued at $46,450.00 and each had full knowledge of the other's assets.

4. Under the terms of the antenuptial agreement Helen waived any right she might acquire at any time in the property of Sam by reason of the marriage,

and Sam made a reciprocal waiver as to Helen's property.

5. Under the terms of the agreement Sam and Helen relinquished any "inheritance rights" either might acquire by reason of marriage in the estate of the other.

6. Under the terms of the agreement Sam's estate was obligated to pay Helen the sum of Four Hundred ($400.00) Dollars a month for the rest of her life if he predeceased her, and Helen's estate was obligated to pay Sam the sum of Fifty ($50.00) Dollars a month for the rest of his life if she predeceased him.

7. Sam and Helen married on 18 December 1965 and on 19 August 1967 Sam, a citizen of the United States and a resident of Norfolk, Virginia, died. Surviving Sam as his closest relation and next of kin was his widow, Helen, and his son, Leonard Sutton, who became Executor of Sam's estate.

8. Sam's last will and testament was executed 8 June 1967 and admitted to probate 23 August 1967 in the Circuit Court of the City of Norfolk, Virginia. By his will Sam directed his executor to pay over to Helen Four Hundred ($400.00) Dollars a month and this provision was in accord with the terms of the antenuptial agreement. Additionally Sam bequeathed to Helen all of the household furnishings and furniture contained in Sam's home. The rest, residue and remainder of Sam's estate was left to his son, Leonard Sutton.

9. No specific asset or portion of the estate was designated or directed by Sam to be set aside to satisfy the monthly payments due Helen under the terms of the antenuptial agreement and the same are payable out of the residue of Sam's estate.

10. In his petition before the United States Tax Court the executor claims a deduction as a debt of Sam the present value of the payments due Helen pursuant to the terms of the antenuptial agreement which he alleges to be approximately $55,000.00. This deduction was denied by the Commissioner.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

After receipt of notice of determination by the Commissioner of Internal Revenue that Sam's Estate Tax was deficient in the amount of $21,725.23, taxpayer petitioned the United States Tax Court for a redetermination of any deficiency. United States Federal jurisdiction was based on Section 6213(a) of the Internal Revenue Code of 1954, 26 USC 6213(a).

ARGUMENT FOR ALLOWANCE OF WRIT

(a) The decision of the United States Court of Appeals for the Fourth Circuit is in conflict with the test established by the United States Court of Appeals for the Sixth Circuit in Latty v. Commissioner, 62 F.2d 952 (1933).

In Latty v. Commissioner, supra, the Court considered whether a claim of a daughter against the estate of Latty was "contracted bona fide and for a fair consideration in money or money's worth" and thereby be either allowed or disallowed as a deduction against the estate of Latty. The court stated on page 954, "...we think that ordinarily these words must be construed to evidence an intent upon the part of Congress to permit the deduction of claims only to the extent that such claims were contracted for a consideration which at the time either augmented the estate of the decedent, granted to him some right or privilege he did not possess before, or operated to discharge a then existing claim, as for breach of contract or personal injury."

The language of the Latty case, supra, was followed in Glasser v. Commissioner of Internal Revenue, 69 F.2d 254, 256 (CCA 8, 1934), and cited in Commissioner of Internal Revenue v. Kelly's Estate, 84 F.2d 958, 964 (CCA 7 1936).

Because of the differing positions of the United States Court of Appeals of the Sixth Circuit and the Fourth Circuit, the issue should be considered by the Supreme Court and a rule of law established to bring uniformity throughout the federal courts.

(b) That decision has settled as important question of federal law which has not been, but should be settled by the Supreme Court.

In the case at bar Sam and Helen has each married and lost their spouses. Each had raised a family, had acquired significant estates, and determined to marry. Before marriage, they determined to settle their respective estates and each made a full disclosure of all assets and their value to the other. They agreed in advance of marriage to relinquish any marital rights in the estate of the other that might arise as a result of the marriage of the parties and the subsequent death of one spouse. They further exchanged mutual promises of annuity to be paid the survivor out of the estate of the first to die. Sam bound his estate to pay Helen Four Hundred ($400.00) Dollars a month for the rest of her life if she survived him and Helen bound her estate to pay Sam Fifty ($50.00) Dollars a month for the rest of his life if he survived her.

Sam and Helen, by a legally binding prenuptial agreement bargained the preservation of their respective estates, leaving for testamentary disposition the bulk of each estate. Accordingly, they were able to enter into a marriage during the later years of their lives without substantially altering the premarriage status of their respective estates. This they had a perfect legal right to do. Sam, a moderately wealthy man, could will the bulk of his estate to his adult son secure in the knowledge that a marriage in the senior years of his life would not materially alter the premarriage status of a father and his only son and heir.

When on Sam's death, Helen asserted

her claim to the bargained annuity, the Internal Revenue authorities declined to deduct the value of Helen's claim against the estate of Sam stating, in effect, it did not qualify as a deductable claim because Helen had not given as consideration for her claim a contingent annuity which was equal in dollars and cents value to the contingent annuity she was to receive. To the extent of the tax deficiency involved in this matter, Sam's estate will be depleted, not by any gain to Helen, but by a loss to Sam's son. If the decision of the United States Tax Court as affirmed by the United States Court of Appeals for the Fourth Circuit is permitted to stand, a major distortion of the Federal estate tax laws will be accomplished.

Why is this an important question of Federal law which deserves the attention of the highest court of the land? Not because Sam's son, as executor and primary beneficiary will have to pay an estate tax deficiency in excess of $21,000.00, but because of the wide ranging effect such a ruling would have on the rapidly increasing numbers of citizens who find themselves in the situation of Sam and Helen. Their plans at estate preservation for the members of the family who have shared the hardships and privations of the successful businessman in the early years of his struggle for success are in part thwarted because of the strained contruction given an enactment of Congress.

The construction advanced by petitioner, it is submitted is consistent with a reasonable interpretation of the

statutes and encourages marriages of older persons while preserving the estate of each party. Such marriages can only benefit by being founded solely on love, respect, and a desire for true companionship unaffected by any nagging suspicion that the marriage was entered into by either party for financial gain.

An important segment of the federal law in estate taxation has not been settled by this Court and if not settled, the decision of the Court of Appeals for the Fourth Circuit will adversely affect increasing numbers of taxpayers. It is submitted, that with the increased life span of the citizens of the United States, the number of late second marriages will increase and when those marriages are based on love, respect, and a desire for true companionship, harmony is promoted in our society.

Such future partners should be able, after full disclosure of their respective assets, to enter into a prenuptial agreement that will effectively fix the interest of each in the estate of the other and when such agreement includes an exchange of reciprocal promises to bind each estate to a claim of the survivor, such claims having been negotiated as a result of a bargain of the parties openly arrived at on terms suitable to each and where the consideration passing to either is not limited to the relinquishment of marital rights, the value of the claim ought to be allowed as a proper deduction from the estate of the first to die.

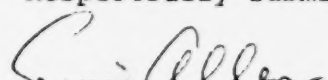
It is submitted it was not the

intention of Congress to deny the deduction of such claims from the taxable estate of a decedent. If Congress wanted in estate taxation to exclude from the definition of the term "full and adequate consideration in money or money's worth" those transactions arising out of a premarital agreement, it could have done so, however, Congress chose only to exclude those transactions, made at any time, wherein the consideration was the relinquishment of "marital rights." A significant group of the population is affected and that group is increasing rapidly in numbers. A decision by the Supreme Court on this important issue will permit them to make mature, businesslike plans for the preservation of their estates.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted and that the decision of the Court of Appeals for the Fourth Circuit should be reversed with the direction to enter judgment on behalf of the petitioner.

Respectfully submitted,



LOUIS B. FINE and
LEWIS ALLEN
Counsel for Leonard Sutton, Executor of the Estate of Sam Sutton

FINE,FINE,LEGUM & FINE
720 Law Building
Norfolk, Virginia 23510

T. C. Memo. 1973-211

UNITED STATES TAX COURT

LEONARD SUTTON, Executor of the Estate of Sam Sutton, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 7590-71. Filed September 24, 1973.

Louis B. Fine, for the petitioner.

Robert K. Dixon, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

QUEALY, Judge: The respondent determined a deficiency in the petitioner's estate tax in the amount of $21,725.32. This proceeding was submitted

under Rule 30 of the Court's Rules of Practice. The issues before the Court for decision are as follows:

(1) Whether the present value of the surviving spouse's right to receive $400 monthly for life pursuant to the terms of a prenuptial agreement is deductible by petitioner under section 2053(a)(3)[1] as a claim against the estate.

(2) Whether, in the alternative, the present value of the aforementioned right qualifies for the marital deduction allowance under section 2056.

All of the facts have been stipulated by the parties. The stipulated facts and the exhibits attached thereto are incorporated herein by this reference and are adopted as our finding of fact. A summary of the pertinent facts is set forth below.

Petitioner is Leonard Sutton, Executor of the Estate of Sam Sutton (hereinafter referred to as "petitioner"). The legal residence of the petitioner at the time of filing the petition herein was Norfolk, Virginia.

---

[1] All statutory references are to the Internal Revenue Code of 1954, as amended.

Sam Sutton (hereinafter referred to as "decedent") died on August 19, 1967, a United States citizen, and a resident of Norfolk, Virginia. He was survived by his widow, Helen S. Sutton (hereinafter referred to as "Helen") and his son, Leonard Sutton (hereinafter referred to as "Leonard"). Helen was 61 years of age at decedent's death.

Decedent's last will and testament was admitted to probate on August 23, 1967, in the Circuit Court of the City of Norfolk, Virginia, and letters testamentary were issued to Leonard as executor of the estate. A timely Federal estate tax return was filed on behalf of decedent's estate with the district director of internal revenue at Richmond, Virginia.

Decedent and Helen were married on December 18, 1965, he being 65 years of age and she 59. Just prior thereto, however, on November 17, 1965, decedent and his wife to be entered into a prenuptial agreement which provided in pertinent part, as follows:

> ARTICLE I: In consideration of the provisions hereinafter contained, Helen S. Eisenson hereby waives, discharges and releases any and all right, title or interest whatsoever which she may acquire in the property, now owned or hereafter acquired, of Sam Sutton at any time hereafter by reason of the marriage.

ARTICLE II: In consideration of the provisions contained herein, Sam Sutton hereby waives, discharges and releases any and all right, title or interest whatsoever which he may acquire in the property, now owned or hereafter acquired, of Helen S. Eisenson at any time hereafter by reason of the marriage.

ARTICLE III: Each party waives, discharges and releases any and all claims and rights that he or she may acquire by reason of the marriage:

(a) To share in the estate of the other party upon the latter's death by way of dower, thirds, curtesy, widow's allowance, statutory allowance or distribution in intestacy; and

(b) To elect to take against the other party's last will and testament; and

(c) To act as executor or administrator of the other party's estate.

ARTICLE IV: (a) In the event that Sam Sutton predeceases Helen S. Eisenson, Helen S. Eisenson shall receive outright, free of any estate or inheritance taxes, the sum of Four Hundred ($400.00) Dollars per month so long as she lives (even if she marries again).

(b) In the event that Helen S. Eisenson predeceases Sam Sutton, Sam Sutton shall receive outright, free of any estate or inheritance taxes, the sum of Fifty ($50.00) Dollars per month so long as he lives.

* * *

ARTICLE X: The consideration for this agreement is the mutual promises herein contained and the marriage about to be solemnized. If the marriage does not take place, the mutual promises shall be null and void.

Both decedent and Helen had full knowledge of the other's personal net worth at the time the above agreement was entered into. As of such time, decedent's assets were valued at $296,946.75 while Helen's were valued at $46,450.

By his last will and testament, executed June 8, 1967, decedent directed his executor to pay over to his wife, Helen, $400 per month in accordance with the terms of the November 17, 1965 prenuptial agreement. In addition, decedent bequeathed to Helen all the household furnishings and furniture contained in their home. The remainder or residue of decedent's estate was devised to his son, Leonard. No specific asset or portion of the estate was bequeathed or directed to be set aside as the source from which Helen's monthly payments were to be satisfied. Consequently, such sums were payable out of the residue of the estate.

On decedent's Federal estate tax return, petitioner claimed a marital deduction under section 2056 in the amount of $80,000 representing the value of Helen's right to receive $400 monthly for life pursuant to the terms of the prenuptial agreement as

ratified by decedent's last will and testament. Respondent disallowed such a deduction. In its petition, petitioner has also taken the position that Helen's right to receive $400 monthly for life is deductible under section 2053(a)(3) as a claim against the estate.

OPINION

Prior to their marriage in December of 1965, decedent and his wife to be, Helen, entered into a prenuptial agreement whereby each agreed to waive and release all marital rights that he or she might acquire in the other's property, whether presently owned or subsequently acquired, as a result of the anticipated marital union. It was also agreed that Helen should receive $400 monthly for life should she survive the decedent, and in the event decedent should survive Helen, he should receive $50 monthly for life. The decedent predeceased his wife. In his last will and testament, decedent ratified the terms of the prenuptial agreement and directed that Helen be paid $400 monthly for life pursuant thereto.

Petitioner contends that the actuarial cost or value of Helen's right to receive $400 monthly for life is deductible from the gross estate under section 2053(a)(3) as a claim against the estate. In the alternative, petitioner argues that the present value of such right qualifies as a marital deduction under section 2056.

Section 2053(a)(3)[2] allows as a deduction from the value of the gross estate all claims against the

---

[2] Sec. 2053 provides, in pertinent part, as follows:

SEC. 2053. EXPENSES, INDEBTEDNESS, AND TAXES.

(a) General Rule.--For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts--

* * *

(3) for claims against the estate, and

* * *

(c) Limitations.--

(1) Limitations applicable to subsections (a) and (b).--

(A) Consideration for claims.--The deduction allowed by this section in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded on a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; * * *

estate which are allowable by the laws of the jurisdiction under which the estate is administered. Where the claim is founded on a promise or agreement, however, the allowable deduction for such claim is limited under section 2053(c)(1)(A) to the extent it was "contracted bona fide and for an adequate and full consideration in money or money's worth."

Section 2043(b) further provides that "a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'"

There is no dispute that Helen's right to receive $400 monthly for life is a claim against the estate within the meaning of section 2053(a)(3). The sole question is whether such claim was contracted for an adequate and full consideration in money or money's worth within the meaning of section 2053(c)(1)(A).

Petitioner argues that the requirement of "adequate and full consideration in money or money's worth" is satisfied by virtue of the fact that the present value of decedent's and Helen's annuity promises, measured as of the date of the prenuptial agreement, reflected an equal portion of their respective estates.

The requirement that an allowable claim against the estate must be contracted "for an adequate and full consideration in money or money's worth" dates back in its present form to the Revenue Act of 1926. It was carried over without change in section 2053 of the Revenue Act of 1954.[3] The courts have long held that it is not sufficient that the claim be enforceable as a matter of state law. In order to meet the test prescribed in the statute, there must be a commensurate benefit flowing from the claimant to the decedent. See Latty v. Commissioner, 62 F. 2d 952 (C.A. 6, 1933). Furthermore, the consideration flowing to the decedent and the claim against the

---

3 H. Rept. No. 1337, 83d Cong., 2d Sess. (1954), p. A317.

decedent must be of comparable value in terms of dollars and cents. Estate of Herbert C. Tiffany, 47 T.C. 491 (1967); Estate of Ella J. Davis, 57 T.C. 833 (1972). The consideration for Helen's life annuity of $400 per month predicated on the prenuptial agreement fails to meet that test. Decedent received nothing of comparable value. See Estate of Frances R. Pollard, 52 T.C. 741 (1969).

In the alternative, petitioner contends that the present value of Helen's right to receive $400 monthly for life qualifies for the marital deduction under section 2056. Section 2056(a) provides that the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the gross estate the value of any interest in property which passes or has

passed from decedent to his surviving spouse. Section 2056(b) provides, in pertinent part, as follows:

> (b) Limitation in the Case of Life Estate or Other Terminable Interest.--
>
> (1) General rule.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest--
>
> (A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse * * *; and
>
> (B) if by reason of such passing such person * * * may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;
>
> * * *

Upon Helen's death, her interest will terminate and the property from which she received her annuity payments will pass to decedent's son, Leonard, for less than adequate and full consideration in money or

money's worth. He will also have absolute ownership of such property to possess and enjoy as he pleases. It is thus clear that Helen's interest is a so-called "terminable interest" under the above provisions and as such does not qualify for the marital deduction. Jackson v. United States, 376 U.S. 503 (1964).

In accordance with the foregoing,

Decision will be entered for the respondent.

15

UNITED STATES TAX COURT
WASHINGTON

LEONARD SUTTON, Executor of the ESTATE OF SAM SUTTON, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 7988-71.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed September 24, 1973, it is

ORDERED AND DECIDED: That there is a deficiency in estate tax due from the petitioner in the amount of $21,725.32.

(signed) William H. Quealy

Judge

Entered: SEP 24 1973

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1123

LEONARD SUTTON,
Executor of the
Estate of Sam Sutton,

Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Appeal from the United States Tax Court at Washington, D. C.

Argued May 8, 1974 Decided June 19, 1974

Before BRYAN, Senior Circuit Judge, and WINTER and FIELD, Circuit Judges.

Lewis Allen (Louis B. Fine and Fine, Fine, Legum and Fine on brief) for Appellant; Alfred S. Lombardi, Attorney, Tax Division, United States Department of Justice, (Richard M. Roberts, Acting Assistant Attorney General, Meyer Rothwacks and Loring W. Post, Attorneys, Tax Division, United States Department of Justice, on brief) for Appellee.

PER CURIAM:

Confronted with a determination of a deficiency in estate taxes, the petitioner challenged the Commissioner's action in a proceeding in the United States Tax Court. The issues presented to that court were (1) whether the present value of the surviving spouse's right to receive $400.00 monthly for her lifetime pursuant to the terms of a prenuptial agreement was deductible by petitioner under Section 2053 (a)(3)[1] as a claim against the estate; and (2) whether, in the alternative, such present value of the monthly payments qualified for the marital deduction allowance under Section 2056.

The Tax Court held that the widow's claim failed to meet the test of Section 2053 (c)(1)(A) that it had been contracted "for an adequate and full consideration

---

1. All statutory references are to the Internal Revenue Code of 1954, as amended.

in money or money's worth." This determination was buttressed by Section 2043(b) which provides that "a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'" The Tax Court further held that the right to such payments did not qualify for the marital deduction since it was a "terminable interest" within the meaning of Section 2056(b). We accept these determinations of the Tax Court and affirm upon its opinion.[2]

AFFIRMED

---

2. Leonard Sutton, Executor of the Estate of Sam Sutton, Petitioner v. Commissioner of Internal Revenue, Respondent. T.C. Memo. 1973-211.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-217

LEONARD SUTTON, EXECUTOR OF THE ESTATE OF SAM SUTTON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question raised by the petition is whether a claim against petitioner arising out of an antenuptial agreement was supported by "adequate and full consideration in money or money's worth" so as to be deductible for federal estate tax purposes under Section 2053 of the Internal Revenue Code of 1954.

The decedent, Sam Sutton, died testate on August 19, 1967, survived by his wife Helen and son Leonard, who was appointed executor of decedent's estate. The decedent and Helen were married on December 18, 1965 (Pet. App. 5). Approximately one month prior to their marriage, the decedent and Helen entered into an antenuptial agreement which provided, *inter alia,* as follows (Pet. App. 5-6):

ARTICLE I: In consideration of the provisions hereinafter contained, Helen S. Eisenson hereby waives, discharges and releases any and all right, title or interest whatsoever which she may acquire in the property, now owned or hereafter acquired, of Sam Sutton at any time hereafter by reason of the marriage.

ARTICLE II: In consideration of the provisions contained herein, Sam Sutton hereby waives, discharges and releases any and all right, title or interest whatsoever which he may acquire in the property, now owned or hereafter acquired, of Helen S. Eisenson at any time hereafter by reason of the marriage.

ARTICLE III: Each party waives, discharges and releases any and all claims and rights that he or she may acquire by reason of the marriage:

(a) To share in the estate of the other party upon the latter's death by way of dower, thirds, curtesy, widow's allowance, statutory allowance or distribution in intestacy; and

(b) To elect to take against the other party's last will and testament; and

(c) To act as executor or administrator of the other party's estate.

ARTICLE IV: (a) In the event that Sam Sutton predeceases Helen S. Eisenson, Helen S. Eisenson shall receive outright, free of any estate or inheritance taxes, the sum of Four Hundred ($400.00) Dollars per month so long as she lives (even if she marries again).

(b) In the event that Helen S. Eisenson predeceases Sam Sutton, Sam Sutton shall receive outright, free of any estate or inheritance taxes, the sum of Fifty ($50.00) Dollars per month so long as he lives.

* * * * *

ARTICLE X: The consideration for this agreement is the mutual promises herein contained and the marriage about to be solemnized. If the marriage does not take place, the mutual promises shall be null and void.

When this antenuptial agreement was executed, the decedent's and Helen's assets were respectively valued at $296,946.75 and $46,450. Each was fully aware of the other's monetary worth (Pet. App. 7).

The decedent's will directed his executor to pay Helen $400 per month in accordance with the antenuptial agreement. On the federal estate tax return, petitioner claimed a marital deduction under Section 2056 of the Code, based in part upon Helen's right to receive $400 per month for life. The Commissioner disallowed the deduction (Pet. App. 7-8). In the Tax Court, petitioner also argued that the value of Helen's right to $400 per month was deductible as a claim against the estate under Section 2053 of the Code (Pet. App. 8). The Tax Court rejected petitioner's contentions and the court of appeals affirmed *per curiam* (Pet. App. 12-14, 16-18).

1. Section 2053(a)(3) provides an estate tax deduction for claims against the estate. However, under Section 2053 (c)(1)(A) of the Code, claims founded on a promise or agreement are deductible only to the extent that they were contracted "for an adequate and full consideration in

money or money's worth."[1] Section 2053(e) refers to Section 2043(b), which specifically provides that the relinquishment of marital rights in the decedent's property or estate shall not be treated to any extent as consideration in money or money's worth.

Here, both courts below recognized that Helen's claim against the estate was based upon the antenuptial agreement in which she agreed to relinquish all claims and marital rights which she might have against the property and estate of her husband, in return for which she would be entitled to $400 per month for the remainder of her life if he should predecease her. The agreement also provided that if she predeceased her husband, he would be entitled to $50 per month for life. In substance, the antenuptial agreement consisted of two separate agreements, calling for each party to relinquish prospective claims in the property and estate of the other in exchange for a contingent life estate. Thus, the essence of the agreement was a reciprocal relinquishment of marital rights, which Section 2043(b) explicitly provides cannot constitute adequate and full consideration in money or money's worth. See, *e.g., Commissioner* v. *Wemyss,* 324 U.S. 303; *Merrill* v. *Fahs,* 324 U.S. 308; Lowndes, Kramer, McCord, *Federal Estate and Gift Taxes,* pp. 395-397 (1974 ed.).

2. Contrary to petitioner's contention (Pet. 7-8), the decision below does not conflict with *Latty* v. *Commissioner,* 62 F. 2d 952 (C.A. 6). Unlike the situation here, that case did not involve a relinquishment of marital rights, which cannot as a statutory matter constitute adequate and full consideration for estate tax purposes.

---

[1]The mere fact that a claim is enforceable under local law is not enough to support a deduction under Section 2053. There must be a consideration in money or money's worth of benefit to the decedent; detriment to the claimant is insufficient. *Taft* v. *Commissioner,* 304 U.S. 351; *United States* v. *Stapf,* 375 U.S. 118, 131.

In *Latty*, a father entered into an agreement with his daughter whereby he would create a trust for her and, pending creation of the trust, pay her a yearly sum. In return, the daughter promised to make no claim against his estate and not to contest his will. The father made the required payments during his lifetime but he did not create the trust. After the father's death, his estate paid the daughter an amount equivalent to the value of the trust and attempted to deduct the payment as a claim against the estate. The court upheld the disallowance of the deduction since the payment to the daughter, founded upon her promise to make no claim against the estate, was not based upon a consideration "in money or money's worth." See also *Estate of Isadore Rubin* v. *Commissioner*, 57 T.C. 817, 825, affirmed, 478 F. 2d 1399 (C.A. 3). Nothing in *Latty* casts doubt upon the correctness of the decision below.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.